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NO. 75-225

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

ROY C. WILLIAMS, *Petitioner*

v.

BRASEA, INC., and VESSEL CIAPESC I, Her engines, etc., BENDER WELDING & MACHINE COMPANY, INC., and CONSTRUCTION MACHINERY COMPANY, *Respondents*

BRASEA, INC., *Petitioner*

v.

BENDER WELDING & MACHINE COMPANY, INC., ET AL., *Respondents*

REPLY OF RESPONDENT, BENDER WELDING & MACHINE COMPANY, INC., TO THE PETITIONS FOR WRIT OF CERTIORARI

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REPLY OF RESPONDENT, BENDER WELDING & MACHINE COMPANY, INC., TO THE PETITIONS FOR WRIT OF CERTIORARI

Respondent, Bender Welding & Machine Company, Inc., prays that the Petitions of Roy C. Williams and Brasea, Inc., be refused, and in support of that prayer would respectfully show as follows:

BASIS FOR REPLY

This brief on behalf of Respondent, Bender Welding & Machine Company, Inc., is submitted pursuant to U. S. Supreme Court Rule 24, 28 U.S.C.

QUESTION PRESENTED

Whether Petitioners Have Submitted "Special and Important Reasons" for This Court's Exercise of its Sound Judicial Discretion by Reviewing this Cause Upon Certiorari.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case, under the subheading "Facts", found in the opinion of the United States Court of Appeals for the Fifth Circuit reported at 497 F.2d 67.

REASONS FOR REFUSING THE WRIT

I.

THE COURT OF APPEALS DID NOT FAIL TO APPLY THE GENERAL MARITIME LAW TO WILLIAMS' CLAIMS AGAINST BENDER; IT MERELY HELD THAT IT NEED NOT DECIDE WHETHER SECTION 402A OF THE RESTATEMENT (SECOND) OF TORTS IS INCORPORATED INTO THE GENERAL MARITIME LAW BECAUSE THE REQUIREMENTS OF SECTION 402A ARE NOT SATISFIED IN THIS CASE.

Both Petitioners have complained of the Court of Appeals' failure to hold that the doctrine of strict tort liability found in Section 402A of the RESTATEMENT (SECOND) OF TORTS is incorporated into the general maritime law. Petitioner Williams has charged that the reviewing court thus failed to apply general maritime law and fell into conflict with other opinions of this Court or the Circuit Courts. In point of fact the Court of Appeals' holding was that, because liability under the strict tort theory of Section 402A had not been demonstrated in this case, there was no need to decide the bolder and far-reaching question of incorporation of the entire strict tort doctrine announced there into the general maritime law. This was an admirable exercise of judicial restraint and merits applause, not criticism.

It is a puzzling inconsistency for Petitioner to have contended previously that the doctrine of Section 402A is embraced by the general maritime law and controls the question of Bender's liability, to have secured a favorable judgment from the Trial Court based upon that doctrine, and then, when the Appellate Court finds no liability under that doctrine, to maintain that the reviewing court erred in assessing liability under it. It is even more puzzling that Williams should charge the Court of Appeals with applying state or common law to this case. It was Williams who first pleaded Section 402A and secured a judgment on the basis of it. And, it is Williams who even now maintains that strict liability is part of admiralty law. The Fifth Circuit did not hold that it is not. Rather, that Court took the 402A formula urged upon it by Williams and found liability lacking under the formula. Petitioner is simply fashioning false arguments.

As Respondent Bender previously pointed out to the Fifth Circuit, the question of incorporation of Section

402A of the RESTATEMENT (SECOND) OF TORTS into the general maritime law is still very much an open and unresolved question. The only federal appellate court which has addressed itself to Section 402A in maritime matters is the Eighth Circuit in *Lindsay v. McDonnell Douglas Aircraft Corporation,* 460 F.2d 631 (8th Cir. 1972). That case involved the death of a test pilot flying over navigable waters and was brought under the Death on the High Seas Act, 46 U.S.C. sec. 761. The Court of Appeals thus was quite prudent in declining to hold directly that the general maritime law unquestionably includes the Section 402A embodiment of strict liability. Such a holding, even were it not lacking in authoritative support, should be reserved for a case in which a clear case of liability is presented by the Appellate record. As is amply demonstrated in the Fifth Circuit's opinion, this is not such a case.

Williams' prime concerns regarding application of Section 402A, none of which he entertained at the Trial Court level when he enjoyed a judgment based upon that doctrine, seem to focus upon supposed inconsistencies with past maritime concepts. These illusions, however, are quickly dispelled by the light of examination. For example, the complaint that Williams' recovery should not have been reduced by forty percent because Section 402A disallows contributory negligence as a bar to recovery falls for at least two reasons. First, as is suggested in *Lindsay v. McDonnell Douglas Aircraft Corporation,* supra, a case advanced by Petitioner, comparative negligence and Section 402A may be harmonized. This is so when it is recalled that comparative negligence does not bear on the question of liability as would a defensive issue such as contributory negligence; it speaks only to the

issue of damages. Levine, Buyers' Conduct as Affecting the Extent of Manufacturers' Liability in Warranty, 52 MINN. L. REV. 629 at 635 (1968); see *Dippel v. Sciano,* 37 Wis. 2d 443, 155 N.W.2d 55 (1967). As Petitioner himself points out, contributory negligence has been dropped in favor of comparative negligence in other areas of maritime law, so why not again? Second, of course, as the Fifth Circuit carefully explained, this question was simply not even reached in the instant case because no liability against Bender under Section 402A was established.

Petitioner Williams also expressed concern that the Fifth Circuit cited only two non-maritime diversity cases based upon Texas products law and its treatment of Section 402A. This complaint overlooks the documented paucity of maritime strict liability cases. The cases cited were recent ones decided by the Fifth Circuit, the same Appellate Court as here, and involving the same new and just-developing legal doctrine, Section 402A. In the absence of a body of Federal maritime decisions applying that doctrine, these cases are persuasive. It must be noted at this point that Petitioner has himself cited in his brief numerous opinions from different jurisdictions about the country in his discussion of Section 402A.

Petitioner's other fears of conflict between Section 402A and past maritime principles or inconsistency in interpretation center upon the "unreasonably dangerous" concept, use of "proximate cause" language, the effect of product users' knowledge in determining liability, the role of assumption of risk and the legal significance of product misuse. Regarding the "unreasonably dangerous" element, Petitioner relies upon the well-discredited opinion in *Cronin v. J. B. E. Olson Corporation,* 501 P.2d 1153

(Calif. Sup. 1972). While it has been said that the terms "defective" and "unreasonably dangerous" are not separate requirements under Section 402A, it hardly follows that the notion of "unreasonable danger" may safely be jettisoned from the strict liability doctrine altogether. Rather, as Dean Page Keeton, perhaps the foremost authority on products liability and a member of the advisers who penned Section 402A, has recently observed, the term "unreasonably dangerous was meant . . . as a definition of defect." Keeton, Products Liability and the Meaning of Defect, 5 ST. MARY'S L. J. 30, 32 (1972). Thus, says Dean Keeton in criticism of *Cronin,*

> "The difficulty is that no context was given to the concept of defect and this is vitally important when a plaintiff's theory is that a product, although fabricated and constructed as it was intended to be, subjected users or others to an inherent risk of harm that made the product defective." 5 ST. MARY'S L. J., supra, at 31.

Comment i under Section 402A of the RESTATEMENT is the original and by far the most widely accepted test of unreasonable danger. The rationale behind the test there stated is well-explained in the comment.

Regarding proximate cause, the Fifth Circuit concluded that Bender's alleged mispositioning of the snatch block frame was not a proximate cause of injury. The Court held that Bender was not required to foresee the type of risks which manifested themselves in this case. While a manufacturer could foresee snarls in the line and attempts to correct them, no reasonble court could require it to anticipate that an individual would order the power to a winch turned on when his hands were in the line, or that another would turn the power on while his Captain's

hands were so situated. This position does no violence to *Eshbach v. W. T. Grant's & Co.,* 481 F.2d 940 (3d Cir. 1973), cited by Williams. In the words of *Eshbach,* such use was neither intended nor foreseeable and the injury was not "the probable result of the normal use of the product or a use which can be reasonably anticipated." The only authorities cited by Petitioner which even hint that proximate causation is not the proper causation inquiry are, ironically enough, Texas cases, use of which was previously criticized by Petitioner. On the other hand, the Fifth Circuit has consistently sanctioned use of a proximate cause formula in Section 402A cases. E.g., *Helene Curtis Industries, Inc. v. Pruitt,* 385 F.2d 841 (5th Cir. 1967); *Ross v. Up-Right, Inc.,* 402 F.2d 943 (5th Cir. 1968); cf. *Reyes v. Wyeth Laboratories,* 498 F.2d 1264 (5th Cir. 1974). This practice has broad support among the commentators. Dickerson, Products Liability: How Good Does a Product Have to Be? 41 IND. L. J. 301 at 329 (1967); Wade, Strict Tort Liability for Manufacturers, 19 Sw. L. J. 5 at 22, 23 (1965).

As for the effect of a product user's awareness of product danger on liability, two things should be stressed. First, Respondent agrees that other factors can be relevant when assessing the reasonableness vel non of the level of product danger. In fact, the Fifth Circuit expressly applied a "cost-benefit" analysis and weighed a number of factors pertinent to the question of reasonableness of danger posed. But, under Section 402A and comments g and i, both defect and reasonable danger are defined in terms of consumer expectations, an objective test, and this type of case reveals unusually complete user knowledge regarding potential product danger. The only "absurd result" possible here, to use Petitioner's vernacular, would

be a finding that the equipment onboard the boats of veteran shrimper captains is more dangerous than they ever contemplate. Such a conclusion would literally fly in the face of the entire record regarding shrimpboats and their captains. Second, user knowledge as a defensive matter presents a subjective test and inquires into a particular user's actual knowledge and appreciation of a specific product danger. Petitioner's authorities on this question do not hold that user knowledge is relevant *only* as a defensive issue; they all are cases where only the defensive matter of assumption of the known risk was an issue. Petitioner has confused what are two separate and distinct elements of the case, i.e., (a) liability, a part of plaintiff's case, and (b) defensive issues, part of the defendant's case and relevant only if liability is already established.

The defense of assumption of risk is clearly provided in Comment n under Section 402A. Williams has complained that such a defense is not recognized under other established maritime principles such as seaworthiness. However, as Petitioner himself carefully points out, strict tort and unseaworthiness are two separate doctrines and these two separate doctrines provide theories of recovery against different potential defendants. The seaworthiness doctrine is restricted to ships and their owners, whereas strict liability opens avenues of recovery from, e.g., those who build the ship or its component parts and equipment, as here. More significantly, as Petitioner observes in his petition to this Court, the seaworthiness doctrine was developed out of an abundance of concern for the seaman who is at the mercy of the ship, upon which he must live for months at a time, and its owner. Where the entire rationale behind, and the purposes of, the two doctrines

are different, differences in the doctrines themselves are understandable and not without justification. Even so, assumption of risk is not essential to the Fifth Circuit's exoneration of Bender from liability in this case. Bender was exonerated because its product was not defective and unreasonably dangerous and did not cause Petitioner's injuries. Thus, any treatment of assumption of risk in the Appellate Court's opinion is not critical to this appeal and the proper role of assumption of risk in maritime strict tort liability cases must properly be left for another day.

As for product misuse, proof of misuse in a products liability case is a means of establishing that the product is not characterized by a defect which caused the accident. Noel, Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk, 25 VAND. L. REV. 93, 103 (1972); Noel, Products Liability, Bystanders, Contributory Fault and Unusual Uses, 50 F.R.D. 321, 332, 333 (1970); Noel, Products Defective Because of Inadequate Directions or Warnings, 23 Sw. L. J. 256, 267 (1969). Or, otherwise stated,

> "Use different from or more strenuous than that contemplated to be safe by ordinary users/consumers, that is, 'misuse', would either refute a defective condition or causation." *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965)

In the instant case the winch on the CIAPESC I, as rigged, imposed no undue threat to those on board and would never have been a source of injury to Williams without Seaman Terry's having turned on the power. Snarling of lines on winches sans brakes was a very common annoyance on shrimpers and a fact of life well-understood by Petitioner Williams. The evidence disclosed

that lines will tangle regardless of whether a fair lead problem might exist. Williams' and Terry's acts are what produced the injury. *Watz v. Zapata Off-Shore Company*, 431 F.2d 100-116 (5th Cir. 1970), cited by Petitioner, held that only *foreseeable* third party abuse attaches liability to the defendant, just as only foreseeable misuse will fail to be of aid to a defendant in a products case. E.g., *Helene Curtis*, supra. The sine qua non to injury and the element for which Bender is in no way responsible was the re-activation of the winch while Williams' hands were enmeshed in the line.

The Fifth Circuit, of course, made no unqualified holding of misuse in its opinion. It chose instead to hinge misuse upon a finding, upon remand, that Terry negligently turned the power back on, saying that the misuse comment to Section 402A, comment g, buttresses the conclusion that the product here in question was not defective and unreasonably dangerous and was a cause of Williams' injuries. This is entirely consistent with the misuse authorities cited above. Petitioner's complaints regarding misuse, then, are academic exercises and will avail him nothing on appeal.

II.

BRASEA IS NOT ENTITLED TO INDEMNITY FROM BENDER.

Petitioner Brasea has maintained that, should the liability of Respondents CMC and Bender Welding & Machine Company, Inc., be restored by this Court, then it is entitled to indemnity from Respondents upon the basis of *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Co.*, 350 U.S. 124 (1956) and *Italia Societa v. Oregon*

Stevedoring Co., 376 U.S. 315 (1964). Both of those cases, however, involve suit by a shipowner against a stevedore to reclaim damages to an injured employee of the stevedoring company, not suit against a product manufacturer or assembler. And in those cases the injured party was a longshoreman, not a ship's master. The *Ryan* doctrine has long been recognized as one devoted to the traditional relation of stevedore-shipowner and repairman-shipowner. E.g., *Delta Engineering Corp. v. Scott*, 322 F.2d 11 (5th Cir. 1963).

Moreover, as the Fifth Circuit appropriately pointed out in its opinion in this case, *Ryan* was limited to a situation of contract breach, but there is none here and the District Court did not make a finding of any in its Memorandum and Order. Further still, if on remand Seaman Terry, and thus Brasea, is found to have been negligent, then the sole source of Brasea's liability will not be anything attributable to Bender or CMC and indemnity from them will not be appropriate.

Petitioner Brasea has thus failed to demonstrate any genuine and material conflict between the Fifth Circuit's opinion in this cause and past opinions of Federal Appellate Courts. Accordingly, review on certiorari is not mandated.

III.

THE COURT OF APPEALS DID NOT ABROGATE ANY APPELLATE RESPONSIBILITIES IN REVERSING THE DISTRICT COURT'S FINDINGS ON LIABILITY AND CAUSATION AS TO BENDER.

The Court of Appeals' holdings exonerating Bender were holdings as a matter of law. They do not represent

instances of an Appellate Court substituting its assessment of the proper weight and quantum of conflicting facts for the determination made by the trial court. A reversal of a trial court's conclusions regarding liability and causation issues as a matter of law is necessarily a decision by the reviewing court that the trial court's conclusions were "clearly erroneous". The Fifth Circuit was obviously well aware of the standard "clearly erroneous" rule in rendering its opinion. Indeed, it noted earlier in its initial opinion that,

> "(We) review the record mindful that factual determinations are to be overturned only if clearly erroneous. F.R.Civ. P. 52(a)." McAllister v. United States, 1954, 348 U.S. 19, 75 S.Ct. 6th, 99 L.Ed. 20.

A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court is convinced on the whole record that a mistake has been committed. *United States v. United States Gypsum Company,* 333 U.S. 364 (1948). An appellate court is never paralyzed by the "clearly erroneous" test from reversing a trial court's finding which defies logic or flies in the face of established law.

CONCLUSION

Petitioners may obtain the ear of this Court only by presenting "special and important reasons" for review on writ of certiorari, review turning completely upon the Court's exercise of discretion. U. S. Supreme Court Rule 19, 28 U.S.C.; *Fay v. Noia,* 372 U.S. 391 (1963). The language "special and important reasons" within this rule relating to granting of certiorari has been said to relate to problems beyond the academic. *Rice v. Sioux City*

Memorial Park Cemetery, 349 U.S. 70 (1955). No such reasons have been advanced in the petitions now before this Court. No compelling inconsistency has been demonstrated between the Fifth Circuit's opinion in this cause and other past opinions of its fellow Courts of Appeal or this Court. To the contrary, the Court of Appeals assessed Bender Welding & Machine Company's potential liability under the Section 402A doctrine urged by Petitioner Williams and employed by the Trial Court and held that the shrimper constructed by Bender was not defective and unreasonably dangerous and was not the legal cause of Petitioner Williams' injuries. That holding quite simply foreclosed the entire range of academic concerns voiced by Petitioner Williams in his petition. The Fifth Circuit did not decline to apply maritime law and did not apply state law instead. It merely took the legal theory of liability employed by the lower court and held that it need not face the greater question of incorporation of that theory into the general maritime law inasmuch as no liability was established beneath the doctrine in the first place. Thus this Court is not required to pass upon supposed conflicts between Section 402A and established maritime principles or the form in which Section 402A will proceed as an available basis for action under the aegis of admiralty law. And, because Petitioner Williams has not attacked the accuracy of the Fifth Circuit's holdings of no liability, attacking instead only the propriety of using Section 402A to determine the question of liability, there is no ground for entertaining this petition for writ of certiorari.

Brasea's petition is without basis as well. Brasea has expressly conditioned its petition as to Bender upon a conclusion that Bender's product was indeed defective and unreasonably dangerous and was a proximate cause

of Williams' injuries. Respondent Bender has demonstrated both that there is no basis for such a reversal and that, regardless of the matter of Bender's exoneration, Brasea is not entitled to indemnity from Bender anyway, as the Court of Appeals correctly observed.

Accordingly, Respondent Bender Welding & Machine Company, Inc. prays that this Court refuse the petitions for certiorari of Roy C. Williams and Brasea, Inc., leaving the opinion(s) of the United States Court of Appeals for the Fifth Circuit intact, including dismissal of this Respondent as a party defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing petition for writ of certiorari have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the following counsel: J. Robert McKissick, Law Offices of William R. Edwards, 400 Wilson Tower, Corpus Christi, Texas 78403, attorneys for Petitioner Roy C. Williams; M. W. Meredith, P.O. Box 2768, Corpus Christi, Texas 78403, attorney for Construction Machinery Company; and Mr. Charles D. Kennedy, Suite 3710, One Shell Plaza, Houston, Texas 77002 and Mr. Jack G. Carinhas, Jr., 910 East Levee Street, Brownsville, Texas, attorneys for Petitioner Brasea, Inc., on this the _____ day of September, 1975.

WATKINS & MARSHALL

By_____
Attorneys for Respondent,
Bender Welding & Machine
Company, Inc.